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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THOMAS NESBITT et al., Plaintiffs and Appellants, v. COAST TO COAST GLASS CORPORATION, Defendant and Respondent.	B162942 (Los Angeles County Super. Ct. No. PC023120)

APPEAL from a judgment of the Superior Court of Los Angeles County. Howard J. Schwab, Judge. Affirmed.

Holstein, Taylor, Unitt & Law and Brian C. Unitt for Plaintiffs and Appellants.

La Follette, Johnson, De Haas, Fesler, Silberberg & Ames, David J. Ozeran; Wilson, Elser, Moskowitz, Edelman & Dicker, Steven J. Joffe and Peter R. Bing, for Defendant and Respondent.

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Thomas Nesbitt[1] and Cindy Nesbitt appeal from a judgment entered in favor of Coast to Coast Glass Corporation (Coast) after trial to a jury in appellants' action for personal injury to Nesbitt, who fell from a tower at a construction site, and for loss of consortium. Appellants contend the trial court erred in denying their motion for new trial on the grounds of (a) misconduct of counsel, (b) jury misconduct, and (c) insufficiency of the evidence to support the verdict. Coast contends that the appeal is not timely and the trial court was without jurisdiction to address appellants' motion for new trial.

PROCEDURAL AND FACTUAL BACKGROUND

Appellants filed their complaint in August 1999 against Coast, the City of Los Angeles (City), and the general contractor on the project at which Thomas was injured, Tutor-Saliba Corporation (Tutor). Tutor and the City were granted summary judgments prior to the commencement of trial. The case proceeded against Coast.

Appellants filed a motion in limine to exclude evidence of the negligence of Tutor pursuant to Code of Civil Procedure section 437c, subdivision (k) (now subd. (*l*)). The trial court granted the motion.

Trial was conducted from October 10, 2001 through October 29, 2001, when deliberations began. The evidence, viewed in the light most favorable to the judgment, tends to show the following.

Nesbitt was a journeyman drywall finisher and taper who had worked in the trade for many years. He was a foreman, and had conducted on-the-job safety meetings. Nesbitt's employer, Insul Acoustic (Insul), was the drywall contractor for the construction of a Los Angeles Police Department Emergency Vehicle Operations Center (EVOC). Coast was the subcontractor charged with installing glass, including bullet-proof Lexan panels in the EVOC observation towers.

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[1] Cindy Nesbitt was not present when Thomas Nesbitt was injured. In describing the events, we refer to Thomas Nesbitt as Nesbitt.

Coast was to install the window panels in the observation room on the second floor of the three observation towers (Towers A, B, and C) at EVOC. At the time in issue, Coast had placed the Lexan panels in Tower C, but had not completed installation, which would also involve positioning a layer of interior glass and fins to provide support for the panels. Guardrails were set up in each of the towers. There was evidence that Coast had tied off the Lexan panels to the guardrails.

On August 10, 1998, Nesbitt was told to "mud and tape" an area of the ceiling at the front of Tower C. He began working and subsequently fell through the Lexan panels to the ground below. Nesbitt had few memories of the events leading up to the fall. He did recall that there was no guardrail in the tower and that it appeared to be a secure room. Nesbitt's scaffold was downstairs at the time, and a bucket was in the soffit area. Although contested, there was evidence that he could not have reached the far edge of the area where he was working without a height device. Nesbitt testified that in the past he had used a bucket when he could not reach a spot. When workers entered Tower C after the accident, they found the guardrail in pieces in the back of the tower.

Although also contested, there was evidence that the last contractor in Tower C prior to the accident was Insul, whose employees were working there on August 6, 1998. Insul's superintendent testified that the guardrail had to be down for the drywallers to do their work.

Nesbitt sustained severe personal injuries that have prevented him from returning to work as a drywaller and have limited his activities.

The jury returned its verdict on October 30, 2001. It concluded by special verdict that Coast was not negligent. Judgment was entered the same day. Notice of entry of judgment was served on November 19, 2001.

Appellants moved for new trial and for judgment notwithstanding the verdict (jnov). The trial court granted jnov and a new trial on the issues of comparative fault and damages.

Coast sought writ review of the order, and this court directed the superior court to vacate the order granting jnov and for a new trial. Our opinion states that substantial

evidence supports the jury's verdict and that Coast "offered conflicting evidence on nearly every factual issue." The trial court vacated the jnov and order for a new trial. The court denied the renewed motion for new trial. This appeal followed.

The summary judgment in favor of Tutor was reversed by this court in April 2003.

DISCUSSION

I. Coast's contentions

Coast contends that the appeal is untimely, urging that appellants failed to file their notice of appeal within 60 days of service of notice of entry of judgment. (Cal. Rules of Court, rule 2(a).) Coast calculates the period from the date of service of entry of judgment on November 19, 2001. It urges that plaintiffs were required to file notice of appeal on or before January 18, 2002, and were not "entitled to wait to file their notice of appeal until after the order granting judgment notwithstanding the verdict was reversed by the court of appeal in the writ proceeding."

The flaw in Coast's position is its failure to acknowledge that the jnov vacated the earlier judgment. (*Lippert v. AVCO Community Developers, Inc.* (1976) 60 Cal.App.3d 775, 778 ["the judgment notwithstanding the verdict vacated the earlier judgment on the verdict, and no appeal lies from a vacated judgment"].) The trial court granted jnov and vacated the judgment on January 17, 2002.[2] Coast then sought review by writ. The reinstated judgment is a new judgment for purposes of appeal, and the time for filing notice of appeal commences to run upon the issuance of remittitur from the appellate court. (*Id.* at p. 779.) In the present case, notice of appeal was filed November 1, 2002, less than 60 days after the remittitur issued on September 26, 2002. The appeal is timely.

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[2] Coast also contends that the jnov, which it characterizes as partial, is not sanctioned by section 629 of the Code of Civil Procedure, and that consequently the time for filing an appeal was not extended by its entry and reversal. We conclude that the jnov vacated the earlier judgment, and that the time for filing notice of appeal commenced upon the issuance of our remittitur.

Coast also contends that the trial court was without jurisdiction to address appellants' motion for new trial after remittitur issued. Section 629 of the Code of Civil Procedure states: "The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed, and if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same time." We agree with Coast that the motion was denied by operation of law when the trial court granted jnov and a partial new trial. Thus, its subsequent denial of the motion upon issuance of the remittitur was of no effect. The denial of appellants' motion for new trial is reviewable, however, on appeal from the judgment. (*Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215 [order denying new trial may be reviewed on appeal from the judgment].)

II. **Misconduct of counsel**

Appellants contend the trial court erred in denying their motion for new trial on the ground of misconduct by counsel. We review the denial of a motion for new trial for abuse of discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) The appellate court reviews the entire record and makes an independent determination as to whether any error was prejudicial. (*Ibid.*)

Misconduct of counsel may not be urged on appeal, however, absent timely objection and request for admonition in the trial court. (See *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860.) Failure to continue to object and request an admonition may be excused, however, where the misconduct is serious and repeated, and objections are overruled. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 392.)

A. *Evidence of negligence by Tutor*

It is improper to mention or to bring before the jury matters the court has previously ruled inadmissible. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118, 123 [opening statement, voir dire].) Tutor obtained summary judgment upon the

ground that under *Privette v. Superior Court* (1993) 5 Cal.4th 689, any negligence on the part of Tutor was derivative of the negligence of the subcontractor who created the allegedly unsafe condition. The court granted appellants' motion in limine to exclude evidence of negligence by Tutor pursuant to Code of Civil Procedure section 437c, subdivision (k) (now subd. (*l*)) which provides that "[i]n actions which arise out of an injury to the person or to property, if a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." The trial court stated at the hearing on the motion that depending on how the issue arose, evidence that appellants' expert had previously testified that Tutor was at fault might be admissible as impeachment.

Appellants complain that counsel for Coast violated the trial court's order on numerous occasions: during opening statement, in questioning witnesses, and during closing argument. They also contend that Coast's counsel failed to admonish his witnesses regarding the in limine ruling. We conclude that appellants waived the issue by failing to timely object and request admonition, and that they have not shown prejudicial misconduct.[3]

During his opening statement, counsel for Coast stated that Tutor allowed Nesbitt to work in Tower C on the day of the accident, that Tutor instructed Coast to work on Towers A and B without finishing the installation on Tower C, that all of the subcontractors reported to Tutor, and that Tutor was responsible for the overall construction and safety of the project. Appellants did not object to the statements at the time they were made. Later, out of the presence of the jury, counsel for appellants argued that opposing counsel had violated the in limine order. Coast's counsel urged that he had

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[3] Contrary to Coast's position, our subsequent reversal of the summary judgment in favor of Tutor does not excuse any failure by Coast's counsel to comply with the trial court's order.

merely provided the factual setting for events on the day of the accident. The trial court instructed appellants' counsel to prepare a special instruction stating that Tutor is deemed not to be negligent in the matter. The court subsequently so instructed the jury.

Appellants also point to what they characterize as attempts by Coast's counsel to elicit testimony in violation of the order. Appellants objected to only one of the challenged questions. On cross-examination, Coast's counsel asked a former Coast employee to name the entity that wanted the towers completed quickly, apparently contemplating that the answer would be Tutor. The trial court sustained appellants' objection.

Appellants' counsel elicited some of the challenged testimony. While appellants urge that the testimony was volunteered, they did not request an admonition or that the testimony be stricken. The testimony includes the direct examination of a former Coast employee, who testified that the sequence of installation of the Lexan panels was requested by Tutor, that a Coast employee told Tutor that Coast would tie the panels in place, and that Tutor held a safety meeting after Nesbitt's accident. Coast's expert testified on cross-examination that it was Tutor's obligation to maintain the guardrail as the general contractor, and that Tutor directed that the panels be tied.

Appellants' counsel failed to object to other challenged testimony.[4] On cross-examination, counsel for Coast asked appellants' expert whose obligation it was to maintain the guardrail during the time in issue. The expert testified that the obligation was generally the general contractor's, but that if a subcontractor dismantled the guardrail, then the subcontractor was required to replace it. No objection was made to the line of questions. At a sidebar, Coast's counsel asked whether the court's order precluded him from impeaching the expert who, according to counsel, had stated in deposition that the direct cause of Nesbitt's injury was Tutor telling him to work in

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[4] Appellants do not claim to have objected, and we have not found evidence in the record that appellants objected at the time, to either the testimony or questions in issue.

Tower C. The trial court ruled that the question would be improper, and the question was not asked.

Coast's counsel subsequently asked a Tutor employee if he had instructed Coast to secure the panels, and if Coast had secured the panels pursuant to Tutor's instruction. The answers were positive. Coast's counsel asked another Tutor employee if he had the authority to discharge a subcontractor if it was not following safe building practices, and he said he did. Coast's counsel asked Coast's expert to describe a diagram, and the witness mentioned that it was Tutor's responsibility to maintain the guardrails. No objection was made.

Appellants assert that Coast's counsel improperly stated in closing argument that Tutor told Coast to tie back the panels. Coast's counsel quoted a Tutor employee who testified that Tutor told Coast to secure the panels and Coast did so, tying them to a guardrail with blue and white rope. Again, no objection was made. Appellants, having failed to object, have waived the issue. They apparently decided as a tactical matter not to object, await the outcome of the trial, and claim misconduct if the verdict went against them. In the absence of a timely objection, however, the error is waived unless it is so aggravated that it could not be cured by admonition. (*Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 733.) Unlike *Love v. Wolf*, *supra*, 226 Cal.App.2d at page 392, relied upon by appellants, this is not a case of egregious conduct by Coast's counsel, or of repeated misconduct despite numerous objections by appellants. When appellants objected, the trial court sustained the objections.

An order that Coast could not elicit evidence of Tutor's negligence, moreover, would not preclude Coast from all reference to Tutor. Appellants' failure to object deprived the trial court of an opportunity to cure any misconduct by admonition, as well as to establish a boundary between permissible and impermissible inquiry into Tutor's role at the worksite. We, like the trial court, fail to see in Coast's counsel's actions the kind of deliberate disregard of the trial court's order that would result in a finding of misconduct. Counsel for Coast did not engage in the kind of flagrant misconduct that

could not be cured by an admonition. Nor have appellants shown that Coast failed to admonish its witnesses to abide by the in limine order.

Even assuming some misconduct, however, appellants have not shown prejudice. The jury was not asked who was negligent, but rather if Coast was negligent. It did not address damages or comparative fault. Even if the jury became convinced that Tutor was negligent, that belief would not have precluded a finding that Coast was also negligent. (See *Knowles v. Tehachapi Valley Hospital Dist.* (1996) 49 Cal.App.4th 1083, 1095 [where jury did not reach causation, evidence tending to show that a hospital that had been granted summary judgment caused the decedent's death was not prejudicial].) Appellants have not shown prejudice.

B. *Diagram*

Appellants also object to Coast's introduction of a diagram of a guardrail asserted to be of the sort in use at Tower C. The trial court admitted the diagram into evidence based upon the testimony of Coast's expert, Donald Komorous. Appellants objected to the diagram. The trial court permitted it, stating that the diagram merely reflects the expert's "opinions on safety using hypotheticals based upon the evidence presented in this court. There has been disputed evidence. The jury will have to determine what is true and what is not true." Komorous stated the bases for the diagram, which included his observation of the tower and his review of approximately 20 depositions. Appellants cross-examined Komorous concerning the bases for the diagram. Its introduction was not misconduct.

C. *Deposition testimony*

Appellants also contend that counsel's offer of deposition testimony of a Tutor employee based on a representation to the court that he was unavailable was misconduct. The court, however, was not satisfied with counsel's attempt to show unavailability and excluded the testimony. The evidence does not show affirmatively that Coast's counsel lied to the court. He stated that he was told by Tutor's counsel that the witness was

unavailable. In any event, the evidence was excluded and its offer could not have prejudiced appellants.

III. **Juror misconduct**

A. *Negligence of Tutor*

Appellants contend that the jurors in the present case considered the negligence of Tutor, in violation of an instruction that Tutor was deemed not to be negligent. Appellants submitted three signed juror declarations stating that the jurors discussed Tutor's fault and that it had probably settled with appellants.[5] Coast contends that the juror declarations are inadmissible, as they were submitted as proof of the jurors' subjective reasoning processes.

Jurors may testify to overt acts, that is, statements, conduct, conditions, or events that are subject to corroboration. They may not testify to the subjective reasoning processes of an individual juror or of the collective mental process of the jurors. (Evid. Code, § 1150; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683.) Declarations showing deliberative error in the jury's collective mental process are not admissible. (*Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 335-336.) "Section 1150 'does not envision a procedure whereby a trial judge, as a result of a claim of jury misconduct, reviews a "replay" of the particular language used by various jurors as they deliberated and makes a subjective determination of its propriety. Such a procedure would be too great an extension of the court's limited authority to invade the traditionally inviolate nature of the jury proceedings.' [Citation.]" (*Ford v. Bennacka*, *supra*, 226 Cal.App.3d at pp. 333-334.)

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[5] Appellants also submitted a fourth, unsigned declaration. The declarant, Arthur Rank III, refused to sign it. We, like the trial court, have not considered the unsigned declaration. Nor have we considered the hearsay declaration of attorney Karen Getz concerning statements made by Rank in a telephone conversation.

The declarations state that the jurors discussed Tutor's role in the accident, as well as the instruction that Tutor was deemed not negligent. Some of the jurors said that Tutor was negligent and must have settled with appellants. The testimony tends to show the deliberative process and is admissible, if at all, to the extent it shows an agreement by the jurors to disregard the trial court's instruction. (See *Ford v. Bennacka*, *supra*, 226 Cal.App.3d at p. 336 [declarations that did not show the jury intentionally agreed to disregard applicable law and apply inapplicable law were not admissible].) The declarations do not state that the jurors agreed to disregard the instruction. Instead, the declarations suggest possible confusion, misunderstanding, and misinterpretation of the law.

A conclusion that Tutor was negligent, moreover, would not preclude the jury from finding Coast negligent as well. (See *Knowles v. Tehachapi Valley Hospital Dist.*, *supra*, 49 Cal.App.4th at p. 1095.) We conclude that appellants have not shown prejudicial misconduct.

B. *Personal experiences*

Appellants contend that the jurors improperly relied upon life experiences in reaching their decisions. The signed juror declarations reflect that the jurors discussed their personal experiences in encountering dangerous situations, as well as one juror's experience with head-injury patients and another juror's experience with safety equipment at construction sites.

It is not improper for a juror to express an opinion on a technical subject which is informed by the juror's life experience, so long as the opinion is based on the evidence at trial. A juror may not inject an opinion explicitly based on specialized information obtained from outside sources. (*In re Malone* (1996) 12 Cal.4th 935, 963 [psychologist juror's expressing opinion based upon reading literature regarding polygraph tests misconduct].)

The evidence at trial showed that Nesbitt had suffered a head injury in his fall, that the workers in Tower C confronted a dangerous situation, and that Nesbitt was not

wearing safety equipment. The comments were based upon evidence at trial and do not constitute misconduct.

C. *Experiment*

Appellants contend that the juror declarations reveal a third act of jury misconduct, that a juror conducted an experiment using a piece of paper as a measuring device to demonstrate that Nesbitt could not have reached the area he was mudding without standing on something.

Jurors are not precluded from engaging in all experiments. They may carry out experiments within the lines of offered evidence. (*People v. Bogle* (1995) 41 Cal.App.4th 770, 778-779.) The experiment reported is within the lines of offered evidence in that it recreates the testimony of Coast's expert. We find no misconduct.

IV. **Sufficiency of the evidence**

In considering a motion for new trial, the trial judge is entitled to reweigh the evidence, consider the credibility of witnesses, and draw reasonable inferences contrary to those accepted by the jury. (*Galindo v. Partenreederei M.S. Parma* (1974) 43 Cal.App.3d 294, 302.) Review is limited to whether there is any support for the trial judge's ruling, and it will be reversed only on a strong affirmative showing of abuse of discretion. (*Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.)

In our writ review of the jnov, we determined that substantial evidence supports the verdict. We made an extensive review of the evidence and concluded that, "[b]ased on the foregoing evidence, a jury could reasonably conclude that Nesbitt was at fault for the accident because he stood on a bucket to reach the area where he was working, the accident was caused by the person or persons who took the guardrail down and failed to put it back up, and that the accident was caused as a result of Nesbitt's failing to wear fall protection gear or by his own employer's failure to conduct safety inspections." Nothing raised by appellants on this appeal convinces us that we were wrong in our analysis. The

judgment is supported by substantial evidence, and the trial court did not abuse its discretion in denying appellants' motion for new trial.

DISPOSITION

The judgment appealed from is affirmed. Respondent shall recover its costs of appeal from appellants.

NOT FOR PUBLICATION.

_____ J.

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We concur:

_____ P.J.

BOREN

_____ J.

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